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June 20, 2001

VIA ELECTRONIC FILING

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers; CC Docket No. 96-262

Dear Ms. Salas:

Attached are comments of U.S. TelePacific Corp. d/b/a TelePacific Communications for filing in the above-captioned proceeding. If you have any questions, please call me at (202) 637-1056.

Regards,

Elizabeth R. Park

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
Access Charges Imposed	)	
by Competitive Local	)	
Exchange Carriers	)	

COMMENTS OF U.S. TELEPACIFIC CORP.

U.S. TelePacific Corp. d/b/a TelePacific Communications ("TelePacific"), by its attorneys, hereby submits these comments filed in response to the Commission's Seventh Report and Order and Further Notice of Proposed Rulemaking ("Seventh Report and Order" and "Seventh Further Notice") issued in the above captioned proceeding.[1]

I. INTRODUCTION

TelePacific is a competitive local exchange carrier ("CLEC") offering facilities-based local exchange and exchange access services in California and Nevada. TelePacific filed its initial federal tariff in January 1999 and, pursuant to its tariff, has provided switched access services to numerous large and small interexchange carriers ("IXCs").

The Commission's Order establishing benchmark rates for both originating and terminating CLEC access charges, including toll-free 8YY traffic, balances the competing interests of IXCs and CLECs. This mechanism combines the predictability of regulated rates with short-term security for CLECs whose current cost of providing access service is generally higher than costs to ILECs and who lack bargaining power with respect to the large IXCs.

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[1] *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146 (rel. Apr. 27, 2001) (*Seventh Report and Order* and *Seventh Further Notice*).

AT&T proposes a different pricing rule for 8YY traffic without explaining how CLEC 8YY traffic substantively differs from other forms of access traffic. Instead, AT&T simply asks the Commission to immediately establish the CLEC benchmark for 8YY traffic at the ILEC rate level and detariff this category of CLEC services if offered at a rate above that of the ILEC(s) with whom it competes.

TelePacific submits that the Commission correctly concluded that the CLEC benchmark rate should apply to all CLEC access traffic, including toll-free 8YY traffic. The policy goals that the Commission achieved by establishing the tariff benchmarks for competitive local exchange carrier access should apply equally to all forms of switched access traffic, including 8YY traffic. Eliminating the tariff benchmarks for CLEC-originated 8YY traffic would be inconsistent with the FCC's findings in its Seventh Report and Order.[2]

AT&T attempts to further confuse the issue at hand by implying that aggregator traffic is somehow an invalid form of access traffic.[3] The Commission itself, however, has stated that there is nothing inherently wrong with carriers having substantial traffic imbalances arising from a business decision to target specific types of customers. Aggregator arrangements are not new and should not be singled out for different treatment. AT&T has offered no rational basis to deny CLECs the protections afforded by the benchmark levels established in the Seventh Report and Order.

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[2] *See Seventh Report and Order* at paras. 41-45 ("We conclude that the benchmark rate, above which a CLEC may not tariff, should eventually be equivalent to the switched access rate of the incumbent provider operating in the CLEC's service area. We do not, however, immediately set the benchmark rate at the competing ILEC rate because such a flash cut likely would be unduly detrimental to the competitive carriers that have not previously been held to the regulatory standards imposed on ILECs.").

[3] *See Seventh Further Notice* at para. 98.

II. THE FCC HAS RECOGNIZED THAT INTERIM REGULATIONS PROTECT BOTH CLECs AND IXCs.

The benchmark levels that the Commission established in the Seventh Report and Order promote competition while also protecting the access service customer and the CLECs. One of the reasons why the Commission opted to establish the initial benchmark rates at a level higher than the ILEC rate is to reduce the negative impact on CLEC revenues during the 3-year transition period. Immediately benchmarking the tariff rates for access at the ILEC rate for originating 8YY traffic, as AT&T suggests, would severely harm the many CLECs, such as TelePacific, that handle calls to toll-free numbers. The Commission in its Seventh Report and Order repeatedly emphasizes the damaging effect to CLECs of a flash cut to the ILEC rate. Generally, the benchmark mechanism protects the access-service customer by establishing reasonable rates pursuant to a tariff in situations where the IXC has no control over the access service provider of the end-user traffic. At the same time, the benchmark mechanism protects the CLEC by providing a safe harbor tariffed rate. There is no reason why the same level of tariff benchmarks should not apply to CLEC traffic originated by an end-user to a toll-free 8YY number because the benchmark mechanism serves the same goals with respect to the toll-free calls. TelePacific agrees with the Commission's sense that AT&T has not provided any meaningful support for its proposal to immediately set the benchmark for 8YY traffic at the ILEC rate.[4]

In addition, decreasing the benchmark rates for 8YY traffic would be contrary to the policies addressed in the Seventh Report and Order. A lower benchmark rate will only serve to harm the ability of CLECs to compete with ILECs in the near future, thereby decreasing

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[4] *See Seventh Further Notice* at para. 102 (Commission expressed concern that AT&T's proposed solution to the problem AT&T identifies may "paint with too broad of a brush.").

overall competition in the local exchange market. While 8YY calls are only a portion of the total traffic between IXCs and CLECs, the impact of immediately benchmarking at the ILEC rate would be significant. The benchmark rates established by the Seventh Report and Order reflect a substantial reduction from previous CLEC rates. Another reduction in CLEC rates is not warranted at this time. On the other hand, uniform CLEC access rates impose no burden on IXCs.

8YY traffic should be treated in the same manner as all other access traffic. During the CLEC access charge proceedings, there were no discussions of breaking access traffic into different categories. In fact, the transition rate proposal submitted by ALTS, which was largely adopted by the Commission, was based on the premise that all switched access services are include in the proposed benchmark. No attempt was made by any party to the proceeding to demonstrate that rates should vary by the type of call placed by an end user. There is certainly nothing in the record to justify a different pricing methodology during the transition period simply because some CLECs may have paid or are paying commissions to customers based on 8YY traffic generated from the customer's location.

The CLEC benchmark rates established through these proceedings reflect the understanding that the access traffic in question includes 8YY traffic and that 8YY traffic is treated the same as all other traffic. Only after the benchmark rates were proposed did AT&T suggest that certain forms of access traffic be treated differently.

In the ISP Intercarrier Compensation Order, the Commission held that there is no reason to impose different rates for ISP-bound and voice traffic.[5] The Commission found no

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[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) (*ISP Intercarrier Compensation Order*).

evidence of any inherent differences between the costs on any one network of delivering a voice call to a local end-user and a data call to an ISP.[6] Similarly, toll-free 8YY access traffic utilizes the same lines and equipment as other CLEC access traffic. Following the Commission's reasoning in the ISP Intercarrier Compensation Order, there is no reason why 8YY traffic originating with CLECs should be treated differently. Therefore, TelePacific urges the Commission to treat all originating CLEC traffic the same as terminating traffic.

III. THE COMMISSION SHOULD TREAT CLEC 8YY TRAFFIC THE SAME WAY, REGARDLESS OF WHETHER IT IS GENERATED BY AGGREGATOR ARRANGEMENTS OR OTHERWISE.

AT&T appears to argue that there is something illegal or immoral about aggregator traffic, in which the CLEC's customer receives a commission for 8YY traffic that utilizes the CLEC's network.[7] In fact, the Commission has long held that there is nothing unlawful or improper about the payment of commission on aggregator traffic. Payment of commissions is a common practice in the telecommunications industry. Since at least 1993, AT&T has offered commissions to hotels based on the volume of 0+ traffic the hotel sends to AT&T.[8] The Commission affirmed that AT&T's commissions were legal and held that

> a rebate, by definition, is normally paid by a carrier to an end user customer of the carrier's tariffed service. Although the traffic aggregator is the subscriber for the 0+ service from its premises, it is not the customer for purposes of a rebate analysis, because it is not the party that makes the 0+ call and pays the tariffed rates. In

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[6] *See id.* at para 90. Furthermore, there is a movement toward treating all access traffic the same. In its recent Notice of Proposed Rulemaking, the Commission proposes a unified approach to intercarrier compensation under which *all* types of traffic passing over the local telephone network would be treated the same. *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. Apr. 27, 2001).

[7] Whether and to what extent such commission arrangements will continue in the future in light of the significant rate reductions that some CLECs will experience as the result of the Commission's decision is an open question.

[8] *Telesphere Int'l, Inc. v. AT&T*, 8 FCC Rcd 4945 (1993).

> the instant case, it is clear that while AT&T pays commissions based on the volume of 0+ traffic to traffic aggregators such as hotels, AT&T's customers pay the full tariffed rate of AT&T's interstate long-distance services. Under these circumstances, as the Bureau made clear in its Private Payphone Order, there is no unlawful rebate.[9]

TelePacific and other CLECs may offer commissions to aggregators for 8YY traffic routed over their networks, but this is fundamentally the same as AT&T's long-standing practice of paying commissions to aggregators for 0+ traffic. TelePacific and other CLECs with aggregator arrangements offer hotels, hospitals, universities and other aggregators a competitive alternative to special access facilities that AT&T, and other IXCs and ILECs may offer. These arrangements are not prohibited under the Commission's rules.

AT&T contends that aggregator arrangements somehow harm the development of local exchange competition. It has been TelePacific's experience that such arrangements foster local exchange competition by allowing a new entrant to enter a market and attract customers that will, over time, subscribe to other services offered by the CLEC, including local exchange services. AT&T has provided no factual support for its argument. To the contrary, end-users will generate 8YY traffic regardless of these arrangements. Moreover, penalizing CLECs by immediately benchmarking tariff rates for 8YY traffic at the ILEC rate will not eliminate aggregator arrangements. ILECs and IXCs, including AT&T, also handle aggregator traffic. Therefore, this issue is irrelevant to CLEC access charges, which are the subject of the Commission's Further Notice.

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[9] *Id.* at para. 12. *See also AT&T Private Payphone Commission Plan*, 7 FCC Rcd 7135 (1992) (in which the Commission held that the payment of commissions by AT&T to private payphone companies for volume "0+" traffic was not an unlawful rebate).

IV. CONCLUSION

TelePacific strongly urges the Commission to continue to apply the same benchmark rate mechanism to CLEC 8YY toll-free traffic as it does to all other CLEC access traffic. The policies for implementing the benchmark mechanism are no different for originating end-user traffic than for terminating end-user traffic. The Commission should not decide the issue based on aggregator arrangements because these arrangements are valid and do not affect competition in a way that requires the Commission to regulate.

Respectfully submitted,

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June 20, 2001

CERTIFICATE OF SERVICE

I, Denise Oden, hereby certify that a copy of the foregoing Comments was delivered, via hand delivery, this 20th day of June, 2001 to the following recipients:

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